BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SHERRY LYNN DEVINEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 179,026
OAKWOOD VILLA CARE CENTER a/k/a	)	
AMERICAN HEALTH FOUNDATION	)	
Respondent	)	
AND	)	
	)	
RELIANCE INSURANCE CO. and	)	
TRAVELERS INSURANCE	)	
Insurance Carriers	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

The respondent and its insurance carrier, Reliance Insurance Company, requested review of the Award entered by Administrative Law Judge Bruce E. Moore dated March 1, 1996. The Appeals Board heard oral argument on July 25, 1996.

APPEARANCES

Claimant appeared by her attorney, John M. Ostrowski of Topeka, Kansas. Respondent and Travelers Insurance Company appeared by their attorney, C. Stanley Nelson of Salina, Kansas. The respondent and Reliance Insurance Company appeared by their attorney, Christopher J. McCurdy of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, David G. Shriver of McPherson, Kansas.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The parties stipulated that claimant sustained personal injury by accident arising out of and in the course of employment with the respondent on or about May 23, 1993, and during a four-day period ending on or about November 25, 1993. For the May 23, 1993, accident, the Administrative Law Judge awarded claimant permanent partial disability benefits for a 3 percent whole body functional impairment. For the second accident culminating on or about November 25, 1993, the Administrative Law Judge awarded claimant permanent partial disability benefits for a 2 percent whole body functional impairment through May 1, 1994, permanent partial disability benefits for a 66 percent work disability for the period May 2, 1994, through February 6, 1995, and permanent partial disability benefits for a 29 percent work disability after February 6, 1995.

The respondent and Reliance Insurance Company requested the Appeals Board to review the issues of nature and extent of disability for both accidents and the liability of the Workers Compensation Fund. In addition to those issues, the Workers Compensation Fund raised the issue whether the Appeals Board has jurisdiction to review Fund liability when that issue was not mentioned in the Application for Review. Those are the issues now before the Appeals Board on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award entered by the Administrative Law Judge should be modified.

(1) Nature and extent of disability arising from the May 23, 1993, accident.

The Appeals Board adopts the analysis and conclusions of the Administrative Law Judge that claimant has a 3 percent whole body functional impairment as a result of the May 23, 1993, back injury. This finding is based upon the medical opinion of Michael P. Estivo, D.O., who first saw and began treating claimant in August 1993. The Appeals Board finds Dr. Estivo's opinion persuasive because, among those doctors who testified, he is the only physician who saw claimant between the May and November 1993 accidents.

Because claimant returned to work for respondent at a comparable wage following the May 1993 accident, the Appeals Board adopts the Administrative Law Judge's conclusion that claimant's permanent partial disability benefits should be based upon the functional impairment rating. That finding comports with K.S.A. 1992 Supp. 44-510e which provides as follows:

> "There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

(2) Nature and extent of disability arising from the November 25, 1993, accidental injury.

The Appeals Board adopts the Administrative Law Judge's conclusion that claimant sustained additional permanent injury as a result of the work-related injury which culminated on or about November 25, 1993, and the Administrative Law Judge's conclusion that the November 1993 injury resulted in an additional 2 percent whole body functional impairment.

Two physicians who saw and evaluated claimant after the November 1993 injury testified regarding claimant's functional impairment and their recommended work restrictions. The first physician, physiatrist Pedro A. Murati, M.D., examined claimant on one occasion in March 1994, diagnosed chronic back strain, and found claimant had a 4 percent permanent partial functional impairment according to the AMA Guides. The second physician, physiatrist Lawrence R. Blaty, M.D., examined claimant on one occasion in July 1994, diagnosed chronic lumbosacral strain, and found that claimant had an 8 percent whole body functional impairment based upon the same Guides. Dr. Blaty attributes 75 percent of claimant's total impairment to the May 1993 injury and the remaining 25 percent to the November 1993 injury. Based upon comparing the above impairment ratings provided by Drs. Murati and Blaty to Dr. Estivo's 3 percent rating, claimant sustained additional functional impairment from the November 1993 accident somewhere in the range from 1 to 5 percent. Therefore, the 2 percent whole body functional impairment found by the Administrative Law Judge is reasonable and adopted by the Appeals Board.

Before the November 1993 accident, claimant had temporary work restrictions only. Following the injury in November 1993, claimant was provided permanent work restrictions and limitations. Dr. Murati indicated that claimant should observe the following restrictions: limit occasional lifting to 50 pounds and limit frequent and constant lifting to 30 and 20 pounds, respectively. On the other hand, Dr. Blaty believes the following restrictions are applicable: occasional and frequent lifting should be limited to 40 and 15 pounds, respectively; stooping, climbing, kneeling, and twisting should be limited to an occasional basis; bending should be restricted to once every 30 minutes and a total of 15-20 times per day; and claimant should alternate between sitting and standing every 60 minutes.

After receiving treatment for the November 1993 back injury, in approximately March 1994 claimant returned to work for the respondent but was terminated one month later. Claimant testified she was terminated because she was unable to perform the essential functions of her job due to her medical restrictions. That testimony is uncontroverted. The documents prepared by vocational rehabilitation expert James Molski and admitted into evidence at his second deposition indicates the date of termination was April 8, 1994.

At claimant's deposition taken on September 26, 1995, claimant indicated she began working for Superior Building Maintenance cleaning offices on February 7, 1995, for $4.25 per hour and that she worked evenings five days per week for a total of 20 hours per week. The job required claimant to dust and vacuum offices and clean bathrooms. Since claimant began working for Superior Building Maintenance, claimant has received raises to $4.35 and $4.50 per hour. She also testified that she attempted to work 35 hours or more per week for a three or four month period but that she was unable to "handle it" and asked for fewer hours. Claimant did not further explain why she could not work more than 20 hours per week in that job beyond saying that it was just too many hours and that she had attempted to both work and attend school but "it was too much."

Claimant testified that her job at Superior Building Maintenance is within her medical restrictions. However, she also testified that she had no set hours and she is able to rest between her job assignments, although she typically worked between the hours of 6 and 10 p.m.

Dr. Blaty was the only physician to provide an opinion regarding the effect of the November 1993 back injury upon claimant's abilities to perform former job tasks. Dr. Blaty testified that he reviewed the task loss analysis prepared by vocational rehabilitation expert James Molski and agreed with its conclusion that claimant has lost the ability to perform 40.9 percent of the job tasks claimant performed over the 15-year period preceding the date of accident in light of the medical restrictions he believes claimant should observe.

Because hers is an "unscheduled" injury, claimant's right to permanent partial disability benefits is governed by K.S.A. 44-510e which provides in part:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

Based upon the entire record, the Appeals Boards finds claimant has a 41 percent loss in the number of tasks she performed in the 15-year period preceding the date of accident. This finding is based upon Dr. Blaty's testimony. The Appeals Board may not consider Mr. Molski's opinion of loss of job tasks based upon Dr. Murati's restrictions because that opinion is not "in the opinion of the physician" as required by K.S.A. 44-510e.

Based upon the above, during the period claimant returned to work for the respondent, on or about March 1, 1994, through April 8, 1994, claimant presumably earned a comparable wage and is, therefore, entitled to permanent partial disability benefits for that period based upon the 2 percent whole body functional impairment rating.

For the period from April 9, 1994, through February 6, 1995, claimant was not working and, therefore, had a 100 percent difference in her pre- and post-injury earnings. Therefore, during that period claimant has a 71 percent work disability which is computed by averaging the 100 percent difference in wages with the 41 percent task loss.

For the period following February 7, 1995, respondent argues that the Appeals Board should impute an average weekly wage rather than use the actual earnings figure to compute the difference in pre- and post-injury wages as required under K.S.A. 44-510e. Respondent bases this contention upon the fact that claimant requested Superior Building Maintenance to reduce her hours. Respondent argues that Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), supports its position. The Appeals Board disagrees. In Foulk, the Court of Appeals held that an individual should not be allowed to refuse accommodated employment and, thus, wrongfully manipulate their award of workers compensation benefits. The facts now before the Appeals Board are distinguishable from Foulk. Claimant has neither refused an offer of accommodated employment nor removed herself from the labor market in an attempt to manipulate her workers compensation benefits.

Based upon the above, the Appeals Board finds that for the period after February 7, 1995, there is a difference of 55 percent between claimant's pre- and post-injury average weekly wage. That percentage is derived by comparing the stipulated average weekly wage of $200 to the approximate post-injury wage of $90 ($4.50 x 20 hours). Averaging the percent wage loss with the 41 percent task loss produces a 48 percent work disability.

For the November 25, 1993, accident claimant is entitled to receive permanent partial general disability benefits based upon a 2 percent functional impairment rating for the period through April 8, 1994. For the period April 9, 1994, through February 6, 1995, claimant is entitled to receive permanent partial general disability benefits for a 71 percent work disability. For the period commencing February 7, 1995, claimant is entitled to receive permanent partial general disability benefits for a 48 percent work disability.

(3) Liability of the Workers Compensation Fund.

The Workers Compensation Fund contends the Appeals Board does not have jurisdiction to consider this issue because respondent, in its Application for Review, did not initially list Fund liability as an issue to be determined. The Appeals Board disagrees. The Workers Compensation Fund does not cite any authority to support its argument. The Appeals Board has not promulgated such a rule and because the Appeals Board is otherwise unaware of any statute or rule, either in the Workers Compensation Act or in the regulations promulgated by the Director, requiring the parties to list with specificity the

issues for Appeals Board review, the Workers Compensation Fund's argument must fail. The Fund was apprised of this issue by respondent's brief and was given the opportunity to respond in writing and at oral argument. It cannot be said the Fund's due process rights were infringed upon by this procedure. The Appeals Board has de novo review and may consider any and all issues that were before the Administrative Law Judge.

The Workers Compensation Fund is responsible for 75 percent of the award related to the November 25, 1993, accident under the provisions of K.S.A. 44-566 and K.S.A. 44-567. The Appeals Board finds that before November 1993, claimant had a physical impairment in her low back of a sufficient magnitude to constitute a handicap in obtaining or retaining employment. The Appeals Board also finds that respondent retained claimant in its employ despite its knowledge of the impairment. Also, the Appeals Board finds that the impairment that existed in claimant's back immediately before the November 1993 accident contributed 75 percent to claimant's ultimate impairment and disability. This conclusion is based upon Dr. Blaty's testimony regarding the relationship between claimant's May 1993 and November 1993 injuries.

That division of liability between the respondent and Workers Compensation Fund conforms with K.S.A. 44-567(a)(2) which provides:

> "(2) [S]ubject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the administrative law judge finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the administrative law judge shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award **which is attributable to the employee's preexisting physical or mental impairment,** and the amount so found shall be paid from the workers compensation fund." (Emphasis added.)

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bruce E. Moore dated March 1, 1996, should be, and hereby is, modified:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sherry Lynn Deviney, and against the respondent, Oakwood Villa Care Center, and its insurance carrier, Travelers Insurance Co., for an accidental injury which occurred **May 23, 1993**, and based upon an average weekly wage of $236.34 for 17.8 weeks of temporary total disability compensation at the rate of $157.57 per week or $2,804.75, followed by 397.2 weeks of permanent partial disability compensation at the rate of $4.73

per week in the sum of $1,878.76, for a 3% permanent partial disability, making a total award for this accident of $4,683.51.

As of September 20, 1996, there is due and owing claimant 17.8 weeks of temporary total disability compensation at the rate of $157.57 per week totalling $2,804.75, followed by 155.91 weeks permanent partial disability compensation at the rate of $4.73 in the amount of $737.45 for a total due and owing of $3,542.20, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $1,141.31 is to be paid for 241.29 weeks at the weekly rate of $4.73 until fully paid or further order of the Director.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Sherry Lynn Deviney, and against the respondent, Oakwood Villa Care Center, and its insurance carrier, Reliance Insurance Co., for an accidental injury which occurred on **November 25, 1993**, and based upon an average weekly wage of $200 claimant is entitled to 13 weeks of temporary total disability compensation rate of $133.34 per week or $1,733.42, followed by 6.14 weeks permanent partial general disability for the period November 25, 1993, through April 8, 1994, at the weekly rate of $133.34 in the amount of $818.71 for a 2% whole body functional impairment. For the period April 9, 1994, through February 6, 1995, claimant is entitled to 43.43 weeks of permanent partial general disability benefits at the weekly rate of $133.34, or $5,790.96 for a 71% work disability. For the period commencing February 7, 1995, claimant is entitled to receive 149.63 weeks of permanent partial general disability benefits at the weekly rate of $133.34, or $19,951.66, for a 48% work disability, which makes a total award for the November 25, 1993, accident of $28,294.75. The Workers Compensation Fund is responsible for 75% of the benefits awarded for this accident.

As of October 17, 1996, there is due and owing claimant 13 weeks of temporary total disability compensation at the rate of $133.34 per week or $1,733.42, followed by 138 weeks of permanent partial compensation at the rate of $133.34 per week in the sum of $18,400.92, for a total of $20,134.34 due and owing in one lump sum minus any amounts previously paid. The remaining $8,160.41 is to be paid for 61.2 weeks at the weekly rate of $133.34 until fully paid or further order of the Director.

The respondent and Workers Compensation Fund shall evenly divide and be responsible for the administration expenses itemized in the Award.

The remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board as if fully set forth herein to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
C. Stanley Nelson, Salina, KS
Christopher McCurdy, Wichita, KS
David G. Shriver, McPherson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director